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No. 129

In the Supreme Court of the United States

OCTOBER TERM, 1939

GENERAL AMERICAN TANK CAR CORPORATION, PETITIONER

v.

EL DORADO TERMINAL COMPANY, RESPONDENT

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, AS AMICUS CURIAE

INDEX

CASES CITED

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The Interstate Commerce Commission respectfully submits this brief as *amicus curiae* because of its interest in the important questions presented, involving interpretation of the provisions of the Interstate Commerce Act and of the Elkins Act in their application to leases of private cars, and also because it believes the case involves an important jurisdictional question.

In our memorandum in support of the petition for writ of certiorari we suggested lack of jurisdiction in the District Court to entertain the suit, on

the ground that the controversy presented a question essentially administrative in character, involving determination of a reasonable allowance for transportation services performed by the shipper, and that without a prior determination of this question by the Commission, the court lacked jurisdiction.

No question as to jurisdiction was raised or considered in either of the courts below.[1] It appears, however, the question is open to consideration by this Court, upon its own motion. In *United States* v. *Corrick*, 298 U. S. 435, 440, this Court, holding the District Court to be without jurisdiction in that suit, said:

> "The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a Federal court touching the subject matter of the litigation cannot be waived by the parties, and the District Court should, therefore, have declined *sua sponte* to proceed with the cause. [Citing cases.]"

This brief, therefore, after a statement of the essential facts, submits argument first upon the question of jurisdiction, followed by argument upon the merits for consideration if the jurisdictional point be deemed not well taken.

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[1] Neither the United States nor the Interstate Commerce Commission was a party to the proceedings below, nor did this case come to the attention of either until after the opinion of the Circuit Court of Appeals had been rendered.

FACTS

Petitioner, herein called the car company, is the owner of numerous railroad cars, including tank cars, which it rents or leases to various shippers for the transportation of their products. (R. 30, 173–176.) It is an "independent" company, not affiliated by stock ownership or otherwise with any railroad company. (R. 34, 48.) It is what is known as a "private car line".[2] It is not a common carrier and is not subject to regulation under the Interstate Commerce Act as such. *Ellis* v. *Int. Com. Comm.*, 237 U. S. 434. Its business, so far as letting cars is concerned, seems to be similar in general aspects to that of the Armour Car lines held not to be subject to the Act in the *Ellis Case*, supra.[3]

The respondent, El Dorado Terminal Company, is a wholly owned and controlled subsidiary of the

[2] A term used to designate organizations or corporations supported by private, as distinguished from railroad, capital that control or own a number of cars which they place in the service of railroads or shippers, and whose principal income is derived from compensation for the use of such cars. *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, 326.

[3] In its report of a comprehensive investigation *In the Matter of Private Cars*, 50 I. C. C. 652 (1918), the Commission made the following findings of fact as to the General American Tank Car Corporation, p. 676:

"The General American Tank Car Corporation owns about 5,000 tank cars which are leased to shippers for use in general service of transportation of liquids. The larger number of its cars are continuously used for the transportation of petroleum oils, but many of them are of special

El Dorado Oil Works, a corporation engaged in the production, and shipment in interestate commerce, of coconut oil, operating a large plant at Berkeley, Calif. (R. 3, 5, 30, 47, 169.) The El Dorado Oil Works is herein called the shipper.

On September 28, 1933, the car company and the shipper entered into an agreement under which the former leased to the shipper 50 tank cars, designated as "permanent" cars, at a rental of $27.50 per car per month. (R. 20, 22, 31.) This lease, a renewal of a previous one, was for the three-year period from January 1, 1934 to December 31, 1936. (R. 21.) At the time it was entered into, the 50 cars in question were in the possession of the shipper, under the terms of the prior agreement, which expired December 31, 1933. (R. 21.)

The car company further agreed to supply the shipper with such additional tank cars as it might need for the shipment of its products, these addi-

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design and used to transport acids, wines, cottonseed and coconut oil, etc. * * *."

In its later report in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, also a general investigation, the Commission found, pp. 366–367:

"The General American Tank Car Corporation and its subsidiaries, the Union Refrigerator Transit Company, Quaker City Refrigerator Line, and General American Transportation System * * * own over 8,000 cars that were designed for handling dairy products, fruit, vegetables, and other perishables. About 612 of these cars are leased to, and 636 assigned to, the exclusive use of shippers of dairy products, and 3,886, which are suitable for such traffic, are under contract to the railroads. The others are in the service of meat packers."

tional cars to be ordered by the shipper from the car company from time to time, as needed, and returned to the car company at Berkeley or Oakland, Calif., when no longer needed. (R. 21, 23, 31, 173.) The rental for these additional cars was at the rate of $30 per car per month for the time such cars were in the service of the shipper. (R. 23.)

The agreement provided that the car company would "collect all mileage earned by the cars covered by this agreement" and "each month credit to the rental or service account" of the shipper "all mileage earned by said cars while in the service" of the shipper "according to and subject to all rules of the tariffs of the railroads." (R. 26.)

The shipper agreed not to hire or use any other tank cars than those belonging to the car company. It further agreed to assume certain obligations, e. g., to be responsible for damage or destruction to the cars while on any privately owned tracks. (R. 25.) The cost of repairs to the cars and all maintenance thereof was to be borne by the car company. (R. 24-25.)

The cars were used by the shipper for the transportation of its shipments of coconut oil in interstate commerce from Berkeley, principally to eastern points. (R. 31-32, 169, 172.) It appears that the oil in question solidifies at a temperature below about 85° to 95° F., and for this reason it is convenient that the tank cars used for its transportation be equipped with coils for the application of steam to liquefy the oil, to facilitate unloading.

(R. 169–170.) It appears that the railroads serving the shipper's plant at Berkeley[4] are not prepared at all times to furnish shippers a full supply of tank cars of this type. (R. 163–168, 175.) Their published tariffs, though naming rates on this commodity when shipped in tank cars, disclaim obligation to furnish cars of that type. (R. 163, 201.)

The tariffs of the carriers,[5] though publishing a general provision for the payment of 1½ cents per car per mile, both loaded and empty, for the use of tank cars of private ownership, contained rules governing the application of the provision which precluded payment of the mileage to the shipper under the circumstances of this case. The rules, in effect throughout the period here in question, provided *inter alia* that the mileage would be paid only to the "party" whose "reporting marks" appeared on the cars.[6] (R. 191–201.) It was specially provided in the agreement that all the cars covered thereby should bear the reporting marks of the car company. (R. 21.) The mileage was not, therefore,

[4] The principal transcontinental railroads whose lines reach and serve this plant are the Southern Pacific Co., Western Pacific R. R. Co., and Atchison, Topeka & Santa Fe Ry. Co.

[5] I. C. C. 2692 and reissues, published by the American Railway Association, on behalf of practically all the Class I carriers in the United States and thus having virtually national application.

[6] These reporting marks consist of certain letters, e. g., in the case of this car company, "G. A. T. X.," followed by the designated car number.

under the terms of the tariff, payable to the shipper. (These tariff rules are considered in detail later, *infra*, pages 11–13.)

The terms of the agreement were observed for a period of approximately six months (R. 47–48), or until July 2, 1934, on which date the Interstate Commerce Commission rendered its decision in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323 (set out in full in the record, R. 49–162) in which it held, pages 378–381 (R. 150–158), that the payment in whole or in part to shippers of mileage allowances by railroads, either direct or through car owners, in excess of the amount of rental such shippers pay for the use of the cars and other actual expenses in connection therewith, results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers, and at less than the published rates.

After the issuance of this decision by the Commission, the car company refused to credit or pay over to the shipper any part of the mileage allowances in excess of the rental reserved in the lease. (R. 48.) Until that time the practice had been for the car company to collect the mileage, deduct the rental due, and pay the balance to the shipper. Thereafter, the car company collected the mileage from the railroads, credited the shipper with the amount of the rental due, and retained the balance, refusing to pay it over to the shipper on the ground that if it did so it would be the instrumentality for

the granting of concessions or rebates to the shipper. It appears that both before and after the change in the practice, the aggregate of the mileage earnings each month exceeded the rental due from the shipper. Throughout the entire period, therefore, the shipper paid nothing to the car company for the use of the cars. (R. 172.)

On June 19, 1935, the El Dorado Terminal Company, as assignee of its parent company (R. 5, 30, 190), brought this suit against the car company to recover the balances of the mileage allowances alleged to be due to the shipper *for the period up to May 31, 1935.* It was stipulated by counsel (R. 45–48) and found by the trial court (R. 33–34) that during the 7-month period from November 1, 1934, to May 31, 1935, the car company collected and received from the railroads mileage allowances aggregating $28,595.79 and credited thereof $10,981.66 to the account of the shipper, leaving a balance of $17,614.13. There was also a stipulation and finding as to the earlier period from January 1, 1934, the effective date of the lease in question, to October 31, 1934, on which date the shipper made the assignment to the El Dorado Terminal Company. During this period the car company collected and received from the railroad companies mileage allowances aggregating $22,807.79 and credited thereof $21,889.14 to the account of the shipper, leaving a balance of $918.65. (R. 33, 46.) It was during this period (July, 1934) that the practice of paying the shipper the full mileage al-

lowances was discontinued. There is no clear explanation in the record as to why any period prior to that change in practice was included.

The case was tried October 28, 1936, and February 27, 1937 (R. 39), the latter date after the expiration of the three-year period of the particular lease in question, but no evidence was submitted to show the mileage allowances or any other facts relating to the period of the lease subsequent to *May 31, 1935* (except two unexplained ledger sheets, R. 186, 187, covering items during the period from June 1, 1935, to December 1, 1935). Nor was any evidence submitted to show the outcome of the prior lease or leases except the following statement by the car company's assistant comptroller:

> "During the period covered by the contract it was the practice to send our vouchers to El Dorado Oil Works in settlement of the balances due from time to time. *This occurred over a long period of years.*" (R. 181; italics ours.)

Nor does it appear whether there was a renewal of the lease which expired December 31, 1936.

There is no evidence to show that the 7-month period from November 1, 1934 to May 31, 1935, during which the mileage allowances exceeded the car rental by $17,614.33, was abnormal in any respect. Possibly it may be assumed, therefore, that the mileage continued to be in excess of the rental in about the same proportion during the

remaining 19 months that the lease was due to run and that a further suit has been instituted by the shipper to recover the balances.

If such a suit has been instituted it will undoubtedly be governed by the decision herein.

ARGUMENT

I. In the absence of a published allowance payable to the shipper, who furnished the cars in question, no allowance could lawfully be paid to it by the carriers, and the shipper's only recourse was to institute a proceeding before the Commission, which has exclusive primary jurisdiction to determine a reasonable allowance. Therefore the District Court was without jurisdiction to entertain this suit.

The Circuit Court of Appeals held, correctly we believe, that the shipper, not the car company, furnished the cars in question to the railroads. The shipper leased the cars in question from the car company, under the terms of an instrument to which the railroads were not a party. When it was ready to make shipments, it loaded the cars in question with its products, and tendered the loaded cars to the railroads for transportation. They accepted the loaded cars and transported them to destination. Under these circumstances, it is difficult to perceive how it could be said that the car company supplied the cars to the railroads. It seems clear that the shipper furnished them. Having thus furnished instrumentalities used in the carriers' transportation, it was entitled to a reasonable allowance therefore under section 15

(13) of the Interstate Commerce Act, which provides:

> "If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

But the carriers' tariffs did not provide for an allowance to the shipper for the use of these cars. The only allowance published therein throughout the period here in question was one payable only to the owners of the cars or to the party whose "reporting marks" appeared thereon. The shipper was not the owner of the cars in question; they were owned by the car company, and they bore the latter's reporting marks. Pertinent excerpts from the tariffs are in the record. (R. 192–201.) By reference thereto it will be noted that prior to April 1, 1935, they provided that the mileage would be paid either "to the car owner or to the party

who has acquired the car or cars, provided cars are properly equipped and marked with the assigned reporting marks", subject to the qualification that "Acquirement or ownership will be identified by the assigned reporting marks painted or stenciled on the body of the car." (R. 192–197.)

Since either acquirement or ownership was to be identified by the reporting marks painted or stenciled on the cars, the plain purport of this provision was that the mileage would be paid only to the party whose reporting marks so appeared upon the cars: in this case the car company, not the shipper.

On April 1, 1935, the provision was amended to read as follows (R. 197–201):

> "Mileage for the use of cars of private ownership will be paid for loaded and empty movement only to the car owner—not to a lessee—provided cars are properly equipped and marked with the assigned reporting marks and car number * * *."

So that under the tariffs in effect both prior and subsequent to April 1, 1935, the mileage was not payable to this shipper, for two reasons, first, the reporting marks on the cars were those of the car company and not the shipper's, second, the shipper was not the owner but the lessee of the cars.

Apparently the particular wording of the allowance provision took into consideration the convenience of the carriers, who apparently sought to avoid the responsibility of tracing leases and perhaps subleases in order to pay the mileage to the right

party. But the plain effect of the rule, in its application to cars leased by a car company to a shipper, was to preclude the payment to the real party who furnished the cars. While possibly the rule sought to discourage leases, it could not legally forbid them. Nor does the rule set up a relation of agency as between the railroad and the car company for the payment of the mileage to the actual car furnisher through the intermediary of the car company.[7] None of the railroads was a party to the agreement between the car company and the shipper; and there is no evidence of any privity between the railroads and either the car company or the shipper. (See R. 174).

The allowances in question in this suit were paid by the railroads to the car company despite the fact that it did not provide any facilities or render any services to the railroads for which an allowance was due. Apparently the railroads have a cause of action against the car company for the recovery of these allowances.

In the absence of a provision in the carriers' tariffs showing the fact and amount of the allowance to be paid to the shipper, no allowance was lawfully payable to it, except under an order of the

[7] It is important to observe in this connection that this rule has appropriate application in instances where the carrier leases or rents cars from either independent private car lines or separately incorporated railroad-controlled car lines, as is often done, as indicated in *Use of Privately Owned Refrigerator Cars*, *supra*, pages 326, 347, 351, 352, 377, 382 (R. 56, 94, 95, 102, 103, 148, 159).

Commission, in view of the provisions of Section 6, paragraphs (1) and (7), of the Interstate Commerce Act, which require publication of rates and of "all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered," and provide that no carrier shall "refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The Commission and the courts have consistently so held. In an early case, *Victor Fuel Co. v. Atchison, T. & S. F. Ry. Co.,* 14 I. C. C. 119 (1908), the Commission held, page 120:

> "* * * Complainant claims that tariff publication of the allowance in question is not required by the act, and consequently defendant may lawfully pay at the 50-cent rate for car-door boards supplied before the effective date of the tariff announcing the increased allowance.
>
> This presents the question whether the allowance may lawfully be paid without provision therefor in defendant's tariffs. It seems clear to us that this question must be answered in the negative. The requirement of section 6 that the schedules posted and filed shall contain 'any rules or regulations

which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, *or the value of the service rendered to the passenger, shipper, or consignee,'* plainly requires publication of allowances of this character."

Other early Commission cases to the same effect are *General Electric Co.* v. *N. Y. C. & H. R. R. Co.,* 14 I. C. C. 237, 242; *Rates on Railroad Fuel and Other Coal,* 36 I. C. C. 1, 13. In a recent case, *Terminal Allowance for Switching at Humboldt, Kans.,* 192 I. C. C. 67 (1933), in which the Commission found not justified schedules proposing an allowance to a shipper at Humboldt, Kans., similar to the spotting allowances condemned in *Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services,* 209 I. C. C. 11 (sustained in *United States* v. *American Tin Plate Co.,* 301 U. S. 402), the Commission held, at page 69:

"This allowance was not published in tariff form as required by s ion 6 of the Interstate Commerce Act until schedules herein suspended were filed. The failure to publish the allowance in a tariff filed with us, and the payment thereof in the absence of such publication, were in violation of the Interstate Commerce Act and the Elkins Act. *Waste Merchants Association of New York* v. *Director General et al.,* 57 I. C. C. 686, 689, order sustained in *Interstate Commerce*

Commission v. *United States Ex Rel.,* 260 U. S. 32, 34; *Wisconsin Central Ry. Co. et al.* v. *United States,* 169 Fed. 76; *Omaha Elevator Co.* v. *Union Pacific R. R. Co.* and *Union Pacific R. R. Co.* v. *Omaha Elevator Co.,* 249 Fed. 827, 832. * * *."

Other court cases so holding are *United States* v. *Chicago & A. Ry. Co.,* 148 F. 646, affirmed 156 F. 558 (7th C. C. A.), and, *per curiam,* 212 U. S. 563; *Elwood Grain Co.* v. *St. Joseph & G. I. Ry. Co.,* 202 F. 845; *Southern Cotton Oil Co.* v. *C. of G. Ry. Co.,* 228 F. 335 (5th C. C. A.); compare *Warehouse Co.* v. *United States,* 283 U. S. 501, 511; *Fourche R. R. Co.* v. *Bryant Lumber Co.,* 230 U. S. 316; *Lambert Run Coal Co.* v. *Balto. & Ohio R. R. Co.,* 258 U. S. 377.

Where a shipper performs part of the carrier's transportation service or furnishes an instrumentality of transportation which may not lawfully be immediately compensated by the carrier because of the absence of a published allowance therefor, his recourse is to institute a proceeding before the Interstate Commerce Commission for the recovery of a reasonable allowance.

Under the decisions of this Court in *Mitchell Coal Co.* v. *Penna. R. R. Co.,* 230 U. S. 247, *Loomis* v. *Lehigh Valley R. R.,* 240 U. S. 43, and many others, the Commission has exclusive primary jurisdiction to determine the reasonable allowance in such a case, on the ground that the function is pri-

marily that of rate-making, and is administrative in character. These decisions rest upon the familiar principle established by this Court in the *Abilene* case (*Texas & Pac. Ry.* v. *Abilene Co.*, 204 U. S. 426), that primary jurisdiction in all controversies involving administrative questions lies exclusively in the Interstate Commerce Commission, a principle adhered to by this Court in numerous subsequent decisions including *B. & O. R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Robinson* v. *B. & O.*, 222 U. S. 506; *U. S.* v. *Pacific & Arctic Ry.*, 228 U. S. 87; *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304; *Penna. R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121.

The Commission has made no determination as to what would be a reasonable allowance to the shipper under circumstances such as those shown by the record here. It is true that in its report *In the Matter of Private Cars*, 50 I. C. C. 652, the Commission found in 1918 that the then existing mileage allowance of ¾ cent for the use of tank cars should be increased to 1 cent per mile. It is now immaterial whether that mileage would have been payable either directly or through car companies in the case of a lease by the shipper from a car company, because, in its report in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, the Commission condemned the payment under such circumstances of any amount in excess of the ship-

per's cost.[8] It has not subsequently modified this rule. About 1926 the 1-cent mileage was increased to 1½ cents by the voluntary action of the carriers. The Commission has had no occasion to pass upon the reasonableness of this increased allowance in its general application throughout the country. By the terms of the tariff publishing this mileage, it was not payable to this shipper for the reasons stated above. It does not represent a reasonable allowance to this shipper for the reason that such payments under the circumstances here shown were condemned by the Commission in *Use of Privately Owned Refrigerator Cars, supra.*

To summarize: The District Court was without jurisdiction to entertain this suit for the reasons, (a) the shipper supplied the cars in question to the railroads and it was therefore entitled to a reasonable allowance, but (b) there was no provision published in the carriers' tariffs providing for any allowance to the shipper under the facts shown of record; therefore, (c) the shipper's only recourse was to institute a proceeding before the Interstate Commerce Commission for the determination and recovery of a reasonable allowance, (d) primary jurisdiction to make such determination lies exclusively with the Interstate Commerce Commis-

[8] Cf. *Interstate Com. Comm.* v. *Diffenbaugh*, 222 U. S. 42, 45, 47, 48–49, involving the validity of an order in which the Commission fixed an elevation allowance at ¾ cent per bushel "estimating that to be the actual cost, and being of opinion that to allow any profit would be in effect to permit a rebate.". This part of the order was sustained.

sion, which has made no determination as to what would be the amount of a reasonable allowance to the shipper under circumstances such as those shown by this record.

II. Payment by a private car line to a shipper of any part of the mileage allowances received from the carrier in excess of the rental such shippers pay to the car line and other actual expenses incurred by the shipper in connection with the cars results in such shipper obtaining transportation at less than the established tariff rate.

The duty to furnish cars for transportation rests primarily upon the carrier. The Interstate Commerce Act, in section 1 (3), defines the term "transportation" as used in the Act as including *inter alia* vehicles and all instrumentalities and facilities of shipment or carriage. It then provides, in section 1 (4), that it shall be the duty of carriers to provide such transportation upon reasonable request. *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U. S. 199; *Director General* v. *Viscose Co.*, 254 U. S. 498; *In the Matter of Private Cars*, 50 I. C. C. 652, 671; *Lake-Rail Butter and Egg Rates*, 29 I. C. C. 45.

Prior to 1917, the Commission was without full authority to enforce this duty. In *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208 (1916), this Court held that under the Act as it then stood the Commission lacked power, in the absence of discrimination, to require a carrier which owned no tank cars to obtain a supply of such cars for furnishing to shippers who desired to ship oil and

other liquids in cars of that type. After such authority had been conferred by the Esch Car Service Act of 1917 (40 Stat. 101, adding to the Interstate Commerce Act the provisions now appearing as paragraphs 10 to 17, inclusive, of section 1) the Commission gave consideration, in its investigation *In the Matter of Private Cars,* 50 I. C. C. 652, to the question whether the carriers should be required to furnish cars of special types such as refrigerator and tank cars to the exclusion of privately owned cars. It found that an important part of the interstate commerce of the country is transported in privately owned cars and that it is to the interest of the owners, carriers, and public that their operation should be continued, under such rules and regulations as will insure their efficient handling without discrimination against any shipper or particular description of traffic. It was then recognized, and still is, that the use of private cars was attended with abuses, and the Commission has endeavored by rulings and otherwise to lessen such abuses as far as possible.

In 1931, on its own motion, the Commission instituted an investigation designated *Practices of Carriers Affecting Operating Revenues or Expenses,* Part V of which, entitled *Private Freight Cars,* dealt with conditions surrounding and attending the use of cars owned or operated by persons or corporations other than common carriers by railroad but including carrier-controlled corporations. In its report in that proceeding, with

which was consolidated an investigation and suspension proceeding, entitled *Use of Privately Owned Refrigerator Cars,* 201 I. C. C. 323 (1934); the Commission gave consideration to certain proposed tariff rules and regulations governing the use of privately owned refrigerator cars and to the subject of private cars generally, and in particular, to leases of private cars by private car lines to railroads and to shippers. Certain shippers were protestants in the proceeding and presented testimony but none of them, the Commission found, "own their private cars or have any capital investment in them. Most of those who lease or rent cars derive monetary profits from the mileage earnings and, thereby, obtain transportation at less than the tariff rates." (201 I. C. C., 375.) It further found that "A car line, whether it be shipper or not, can not be expected to build, maintain, and supply cars to the railroads unless it may reasonably expect to obtain a fair return on its investment. In fact, they could not obtain the necessary capital under any other conditions." But as to shippers who own no cars, but lease or otherwise obtain cars through a car line, the Commission held:

> "A shipper, on the other hand, who owns no cars, but leases or otherwise obtains cars through a car line, whether privately owned or railroad controlled, under terms which place him in a more favorable position respecting the question of transportation than

that prescribed by the published tariffs and occupied by shippers generally, is receiving an unlawful concession in violation of the Elkins Act." (201 I. C. C., at 378; R. 151.)

At the hearing held in that proceeding the majority of the shippers who rented or leased cars and most of the private car lines refused to divulge the amounts paid to or retained by said car lines, the shippers refusing on the ground that they did not feel warranted in doing so without the consent of the car lines, while the car lines refused on the ground that they could not afford to do so because of the keen competition between them.

Sufficient evidence was adduced, however, to indicate that substantial profits may be derived by shippers through such leasing arrangements with car companies. As stated in the report, at page 380 (R. 156), one shipper testified that he paid $45 and $50 per month per car for cars leased by him and that the profits derived therefrom were approximately $32.50 per car per month on about 200 cars, *or approximately $78,000 per year.* It seems that that shipper paid the rental and other expenses in connection with the cars leased by him from the car line, and received mileage allowances, either directly from the carriers or through the car line, which completely covered his expenses incident to the lease of the cars and left a large excess or profit, with the result that he obtained transportation at net rates lower than the published tariff rates to the extent of $78,000 per

year.[9] Another shipper, who originally used assigned cars but upon learning that others were making money by the use of private cars, entered into a contract under which he paid nothing to the lessor, but received mileage earnings above a specified amount which averaged about $18.75 per car per month in 1931, and $21.27 per car per month in 1932 on 150 cars. (201 I. C. C., 380; R. 156.) Thus in 1932 that shipper's profit, gained through the aid of the private car line, amounted to $3,190.50 per month or $38,286 for the year. Any other shipper which obtained his cars from the carrier would pay the published tariff rate without diminution. Other shippers, obtaining cars from the same or other car lines, might not be so fortunate in obtaining such favorable terms.

After further reviewing the evidence, the Commission made the following general finding:

> "The leases usually call for the payment of stated amounts per month and the mileage earnings are either paid directly to the shippers or to the lessors. In the latter cases the lessors deduct the amounts due the car companies [lessors] under the contracts and

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[9] Under circumstances somewhat similar to these, at least one private car line has been indicted under the Elkins Act for granting rebates. This indictment is referred to in the opinion of the Circuit Court of Appeals, which mentions the brief of the district attorney on a demurrer to the indictment. No opinion was rendered by the court in that case for the reason, which does not appear in this record, that the demurrer was withdrawn, a plea of *nolo contendere* entered, and a fine imposed, no appeal being taken.

remit the remainders to the shippers. The contract price is usually fixed sufficiently low so that the mileage earnings will exceed the cost to shippers. It is true that, when the cars are leased, the lessees and car companies do not know definitely what the future mileage earnings of the lessees will be, but the evidence is convincing that the inducement actuating the shippers and held out by the car companies is that, *if only sufficient cars to take care of assured needs are leased,* profits may confidently be expected. While the amounts of the profits are indefinite it is a practical certainty that there will be some. Were this not true there would be no advantage in leasing cars over obtaining them on assignment." (201 I. C. C., 381; R. 157, emphasis supplied.)

In the case at bar the shipper leased only 50 cars. The car company, however, agreed to supply as many additional cars over 50 as the shipper might need. In these circumstances, and in the absence of evidence on the subject, it seems a fair assumption that the number leased was sufficient to take care of the shipper's assured needs only, and that if its experience had not shown that it could keep 50 cars moving and thereby earn mileage it would not have agreed to lease that many.

"It cannot be denied," the Commission stated, "that the net cost of the transportation to users of leased and rented cars is reduced by the amounts received in excess of the costs to them and that they are thereby removed from that absolute level of

equality with other shippers which the statute was enacted to establish and that the purpose of the legislation is defeated." (*Ibid.*, 381; R. 158.)

Among the formal findings made by the Commission were several bearing upon these leasing arrangements, as follows:

> "We find * * * that the payment in whole or in part to shippers * * * of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates * * *.
>
> We do not undertake to say that a carrier may not accept private cars if it so desires, but if such cars are accepted the carriers may not acquiesce in arrangements under which mileage earnings accruing to the car owner are paid in whole or in part by such car owner to the shipper-lessee which results in the payment by such shipper of charges less than the published tariff rate." (*Ibid.*, 382–383; R. 160–161.)

In the body of the report, at pages 371–372 (R. 138–139), under the heading "Tank Cars", the Commission said that the record "is not comprehensive enough to warrant a conclusion as to whether abuses, such as we have discussed in con-

nection with private refrigerator cars, attend the use of private tank cars." "That such abuses, however, did exist," the Commission stated, "is indicated by the adoption of a code for tank-car service industry in which certain of the practices herein discussed, such as permitting the lessee of cars to profit through the payment of mileage earnings, is declared to be an unfair trade practice." And although the proceeding related primarily to refrigerator cars and the findings were so restricted, the Commission affirmatively stated, page 382 (R. 159), that "*the general principles enunciated apply equally to all other types of private cars.*" [Italics ours.]

In the same proceeding the Commission considered and approved a tariff rule proposed by the carriers to the effect that the carriers would not furnish to shippers for loading on their lines any cars of private-car lines, including those of railroad control, unless such private car lines certified under oath to the carriers "that no gift, gratuity, or part of the earnings from mileage payments, or otherwise, will be paid directly or indirectly to shippers, their agents or employees." (201 I. C. C., 325, 374, 382; R. 53, 143–144, 159–160.)

In its report the Commission cited and reviewed the well-reasoned decisions in *Spencer Kellogg & Sons, Inc.* v. *United States*, 20 F. 2d 459 (2nd C. C. A.), certiorari denied 275 U. S. 566, and *Interstate Commerce Commission* v. *Reichmann*, 145 F. 235 (D. C., N. D., Ill.). In both of those cases a

third party (a party other than the railroad, but who nevertheless was closely associated with the transportation transaction) made a payment to the shipper of part of the money which it had received from the railroad, with the result that the shipper's transportation rate was reduced below the published tariff rate, and in both cases it was held that such payments were violative of the Elkins Act, which, in broad terms, forbids "any person" to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or other discrimination whereby the property is transported at a less rate than that named in the published and filed tariffs.

The Commission's report shows that numerous shippers throughout the country own private cars; also that there are numerous private-car companies, such as petitioner herein, which own various types of cars and lease or rent them to shippers, and that competition between them is keen. Shippers who own their own cars can receive no greater compensation for their use by the railroads than the published mileage allowances, which are, as nearly as may be, commensurate with the average cost of ownership. On the other hand, shippers who own no cars may earn unlimited profits, if they are permitted, without restraint, to make whatever terms they see fit with keenly competitive private car lines for the rental of cars. The present case shows that the shipper here involved was able to obtain mileage credits of approximately $18,000 over the car rental in the short space of a few

months. This indicates the liberality of the terms of its contract with the car company. Another contract may provide for less liberal terms. There results such inequality as was condemned by this Court in *United States* v. *Union Stock Yard,* 226 U. S. 286, 308-309, where the Court found to be violative of the Elkins Act a contract under which the Stock Yard agreed to pay a packing company a bonus of $50,000, and in which the Court said:

> "* * * Any other company with which it has made no contract would be compelled to pay the full charge for the services rendered without any rebate or concession. Another company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which receives no such bonus there has been an undue advantage given to and an unlawful discrimination practiced in favor of Pfaelzer & Sons. If these companies had filed their tariffs, as we now hold they should have filed them, they would have been subject to the restrictions of the Elkins Act as to departures from published rates— and we must consider the case in that light— and this preferential treatment, as we have said, would have been in violation of that act. It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms * * *."

The Commission's holding that a shipper who has no capital investment in cars, but leases or otherwise obtains cars through a car line, under terms which enable him to earn a profit, thereby obtains transportation at less than the tariff rate in violation of the statute, is supported by the decision of this Court in the *Union Stock Yard Case, supra,* and also by numerous other decisions in this Court, including *Chicago & Alton R. R. Co.* v. *Kirby,* 225 U. S. 155; *Davis* v. *Cornwell,* 264 U. S. 560; *L. & N. R. R. Co.* v. *Mottley,* 219 U. S. 467; *Chi., Ind. & L. Ry. Co.* v. *United States,* 219 U. S. 486, 496; *New Haven R. R.* v. *I. C. C.,* 200 U. S. 361, 391; *Houston & Texas Ry.* v. *United States,* 234 U. S. 342, 356; *Armour Packing Co.* v. *U. S.,* 209 U. S. ~~71~~ 56.

In view of the history of the private car problem in the United States, as reflected in the reports of the Commission *In the Matter of Private Cars, supra,* and *Use of Privately Owned Refrigerator cars, supra,* of the Commission's endeavors to abate the abuses which have arisen in connection with use and leasing of private cars, and of the important purpose of the Commission's condemnation of leases between private car companies and shippers under terms so favorable that such shippers can and do obtain large profits and to that extent reduce their aggregate freight bill, the holding of the Circuit Court of Appeals that such leasing arrangements are not violative of the statute and in effect should be permitted to continue, seems both too narrow and unsound.

It is true that in its report *In the Matter of Private Cars, supra,* in which it fixed 1 cent per car per mile as a reasonable allowance for the use of private tank cars, the Commission found that the allowance to be paid under all the circumstances and conditions shown should be considered on the average, because "there cannot be, with propriety, as many different rates of payment as there are owners with varying ability to efficiently handle the cars with respect to mileage earnings, repairs, and depreciation, nor can there be as many rates as there are different kinds and grades of privately owned cars." (50 I. C. C., 683.) It is probably also true that some owners, handling their cars more efficiently than others, could make a profit at the uniform published mileage allowance. Perhaps absolute uniformity could never be attained. Examination of that report as a whole shows that the mileage fixed was based largely on evidence showing the costs of car *ownership.* If the El Dorado Company were the owner, instead of the lessee, of the cars in question, it would be entitled to the present published allowance of 1½ cents per mile, provided its own reporting marks were placed upon the cars, and if it were able under those circumstances to make a profit, it would not violate the law. But it seems obvious that its costs would be different if it owned its cars instead of leasing them, because if it depended only upon cars of its own ownership it would have to own as many as

the ordinary needs of its business require and, in addition, a sufficient number to meet its maximum needs, with the attendant costs of ownership including maintenance, taxes, depreciation, interest on investment, and the loss of mileage whenever any of the cars stood idle.

But, in its later report in *Use of Privately Owned Refrigerator Cars,* in which the question of leases on favorable terms was particularly in issue, the Commission found that a shipper who has no investment in cars may not lawfully make a profit through leasing arrangements. There is no inconsistency between the two reports. The court below seemed to give full consideration to the earlier report and overlook the salutary principle established in the second report. Both reports show that private car lines are owners of large numbers of cars and that the competition between them is keen. It seems indisputable that they are in a position to grant rebates, as clearly shown by the *Reichmann Case,* and by the circumstances in the present case, if, by private negotiations with shippers, they may lawfully make whatever terms they see fit. For example, here the rental for permanent cars was \$27.50. Suppose instead it had been \$7.50. As long as the parties are under no restraint, there can be no uniformity. Under the principle enunciated by the Commission there is uniformity, and at the published tariff rate, among this class of shippers who are not car owners. The principle enun-

ciated by the Commission is that they may be reimbursed in the form of mileage allowances up to the full extent of their expenses in connection with the cars, so that they will pay no more or less than the published tariff rate.

The Circuit Court of Appeals gave no consideration whatsoever to the question of the reasonableness of the rental fixed in the agreement between the car corporation and the shipper. Nor was there evidence to show what facts and circumstances were taken into consideration by the parties in agreeing upon that rental. Under the agreement, the shipper was to pay that rental and he was to be paid all mileage allowed by the railroads.

Possibly, therefore, the latter consideration influenced the rental; and it is worthy of note in this connection that the 1½-cent mileage was paid on the going loaded movement and also on the return empty movement. If it be assumed that the mileage from Berkeley to a particular eastern destination is 2,500 miles,[10] the total loaded and empty mileage would be 5,000 miles, which at 1½ cents per mile would amount to $75. Thus, but one transcontinental trip of one car during the course of a month would earn mileage $47.50 in excess of the rental of $27.50 per car per month for the permanent cars and more than double the rental

[10] The distance from Berkeley to Cincinnati, Ohio, via the Southern Pacific, Ogden, Union Pacific, Omaha, Chicago and North Western, Chicago, and Pennsylvania, is approximately 2,552 miles.

for the additional cars at the rate of $30 per car per month for the time the car was in the service of the shipper.

The Circuit Court of Appeals stated that the terms of the lease required the shipper "to take the cars into its possession." The record shows that at the time the lease in question was entered into the 50 permanent cars were already in possession of the shipper under the terms of the immediately prior lease; and the testimony of the assistant comptroller of the car company, quoted above, indicates that some such leasing arrangement between the car company and this shipper had been in existence over a long period of years. Yet the record affords no light upon those prior transactions. Did the shipper year after year without fail earn large profits from its arrangements with the car company? Nor was there any evidence to explain how it happened that 50 cars were agreed upon as the number of permanent cars. The agreement plainly provides that the car company will furnish *all* the cars the shipper needed, and the shipper agreed not to obtain cars from any other source. But as shown, the shipper bound himself to pay rental only upon a certain number agreed upon by it and the car company. They were in a position to agree upon any number as the permanent cars. In the absence of evidence upon the subject perhaps it can be assumed that the shipper knew from its experience over a long period of years that it could keep that number

moving—that that number represented its *assured needs*. The shipper of course could not know definitely in advance that in all events and without fail for any reason whatsoever, even a *vis major*, it could keep these cars moving and therefore earn mileage. Yet the regular course of business over a long period of years in the past might have indicated with reasonable certainty that it could.

The record does not establish definitely that the shipper would be held liable for rental throughout the full three-year period. In assuming that it would be, the court below said:

> "Also before it can be determined whether the three-year lease will create a cost less than the mileage earned by the leased cars, it must be considered whether the plant will remain in operation. The monthly rentals go on though a fire or earthquake or a strike makes it impossible to manufacture the oil for shipment in the cars. The supply of copra from the Philippines may cease or become so costly that it does not pay to operate. Tariffs on copra may stop profitable manufacture. * * *."

But apparently the court failed to take into consideration the provisions of the seventh article of the agreement, which provides:

> "It is mutually agreed that time of payment of rental or service charges is of the essence of this contract, and that if the second party shall make default in the payment

of the rental or service charges for said cars at the time when the same becomes due and payable, and such default shall continue for five (5) days, or shall make default in the performance of any of the other agreements herein contained to be by it performed, and such default, other than the non-payment of the rental or service charges shall continue for a period of thirty (30) days after written notice thereof, then and in any of said events the first party may terminate this agreement at its election, and the same shall become and be terminated, or may, at its election, take said cars out of the service of the second party and furnish the same or any thereof to others for such rental or service charges and upon such terms as it may see fit, and if a sufficient sum shall not be thus realized after paying all expenses of retaking said cars and collecting the earnings thereof to satisfy the rental or service charges herein reserved, the second party agrees to satisfy and pay any and all such deficiency promptly upon demand from time to time." (R. 26–27.)

If any of the calamities mentioned by the court should happen, or if for any other reason the plant should close down, the shipper could default in the payment of the rental of the cars. Then the car company would have two elections: first, it could terminate the agreement, second, it could take the cars and rent them to others and the shipper would be liable only for a deficiency in the earnings.

There might be no deficiency. There was no evidence as to what had been the practice of the car company in such instances and no evidence as to what its policy would be in the event this shipper defaulted because things occurred to cause its plant to shut down.

The Circuit Court of Appeals found the oil to be "both inflammable and explosive." There is no such evidence. The Commission's regulations governing the transportation of explosives and other dangerous articles do not list this article either as explosive or inflammable and do not require any particular precautions in its transportation.[11]

The Circuit Court of Appeals assumed that "Since the El Dorado Company has possession of the cars, it must provide trackage facilities for their storage and switching." There is no evidence upon this subject and nothing to show whether the shipper would have been put to greater expense for plant trackage facilities than it would if it had obtained its cars from the railroads. Shippers using private sidetracks or intraplant tracks in preference to the carrier's public team tracks usually are required to pay for them. Cf. *Practices of Carriers Affecting Operating Revenues or Expenses, Terminal Services*, 209 I. C. C. 11, 21;

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[11] Regulations for the Transportation of Explosives and Other Dangerous Articles by Freight and Express and in Baggage Service, revised, effective October 1, 1930.

General Electric Co. v. *N. Y. C. & H. R. R. Co.*, 14 I. C. C. 237.

The Circuit Court of Appeals stated in its opinion that the Commission, since its decision *In the Matter of Private Cars, supra,* "has raised the tariff rate on tank cars to 1½ cents per car mile traveled." The Court cited *Paragon Refining Co.* v. *A. & S. R. R. Co.,* 118 I. C. C. 166 (1926), but that case does not support the court's statement. It was a case presented on the Commission's shortened procedure, wherein, with the consent of the parties, the facts were shown by affidavits, and formal hearing waived. The case related to the movement of petroleum in tank cars from Louisiana to Toledo, Ohio, passing en route over the line of the Alton & Southern, a switching carrier within the St. Louis district. For the use of the private tank cars in which the shipments were transported, the line haul carriers paid an allowance to the shipper of 1 cent per mile. The Alton & Southern refused to pay any allowance, apparently on the ground its switching charge was low. The Commission found that nevertheless it should pay the mileage and it awarded reparation at 1 cent a mile, which was the allowance generally in effect at the time the shipments moved, and required it to pay 1½ cents in the future, the generally applicable allowance having been increased in the meantime. The question was not what the mileage should be, but rather whether the switching carrier should pay any mile-

age. It cannot be said accurately that by that report the Commission raised the mileage to $1\frac{1}{2}$ cents per mile—it had previously been increased to that basis by the voluntary action of the carriers themselves. The Commission has made no investigation as to the reasonableness of this increased allowance in its general application throughout the country.

The entire discussion of the Circuit Court of Appeals in support of its holding that "The Elkins Act makes it a criminal offense for the railways to pay less than their established mileage rates for the cars supplied by the El Dorado Company" overlooks the fact that the very mileage rates referred to are not, by the terms of the mileage tariffs themselves, payable to the El Dorado Company. As previously shown herein, the published tariff provision by its terms precluded the payment of the mileage allowances to that company upon the cars in question. Nor would the Elkins Act or any provision of the Interstate Commerce Act *require* the mileage to be paid to the car company if it did not supply the cars to the carriers. Such allowance provisions are obviously to be interpreted and applied in the light of the facts, and though published they may nevertheless be *rebates*, if not within the meaning of the Elkins Act, then within the meaning of sections 2 and 6 (7) of the Interstate Commerce Act. In *Warehouse Co.* v. *United States*, 283 U. S. 501, the allowance paid by the Pennsylvania to its contract warehouse com-

pany was published in the carrier's tariffs on file with the Commission, but, upon a finding by the Commission that the warehouse actually performed no service for which it was entitled to an allowance, this Court pronounced the payments to be rebates in violation of section 2 (page 511).

In *U. S.* v. *American Tin Plate Co.*, 301 U. S. 402, the allowances were published yet they were found to be unlawful refunds or rebates in violation of section 6 (7) and sections 2 and 3 (1).

Such cases illustrate the necessity for Commission action in allowance cases like the present one. For published tariff provisions, even if binding in cases brought in the first instance in the courts, are not binding upon the Commission, which is authorized to look through the form to the substance of a transaction and pronounce it to be what it really is. As said in *I. C. C.* v. *B. & O. R. R.*, 225 U. S. 326, 345, "Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the Interstate Commerce Act, can look beyond the form to what caused them and what they are intended to cause, and do cause." In *Warehouse Co.* v. *United States*, *supra*, at page 511, the Court said:

> "Where a forbidden discrimination is made, the mere fact that it has long been continued and that the machinery for making it is in tariff form, cannot clothe it with immunity." Cf. *U. S.* v. *American Tin Plate Co.*, 301 U. S. 402, 406, 407.

In the report of the Commission, Division 2, in *Refrigerator Car Mileage Allowances*, 232 I. C. C. 276, decided April 27, 1939, it was held that the Interstate Commerce Act does not require the filing or publication of allowances or other compensation paid by carriers subject to the Act to private car companies which are not shipper owned or controlled. The report recognized the full authority of the Commission under section 15 (13) of the Act over allowances to shippers, and pointed out that such allowances affect directly the freight rates paid by shippers, citing *Ellis* v. *Int. Com. Comm.*, 237 U. S. 434, and must be filed under section 6. The question determined was the authority of the Commission over payments by railroads to private car companies that are not shippers and not shipper owned or controlled, like the car company here before the Court. The Commission said that "a review of the various provisions of the law which we administer leads us to the conclusion that the Commission is without authority to pass upon or to fix the compensation paid by railroads to private car companies for the use of the equipment furnished directly by them to the railroads." It held:

> "* * * Section 6 of the act requires that 'every common carrier subject to the provisions of this part shall file with the Commission * * * schedules showing all the rates, fares, and charges for transportation between the different points * * *.' As neither the private car com-

pany is subject to provisions of the act, nor does the compensation paid to such company for the use of its cars cover transportation in any form, it is evident that the statement of such compensation is not required by section 6 to be filed with us. The tariff schedules concerned should, therefore, be promptly amended by striking therefrom all items covering the payment of compensation to private car companies, not shipper owned or controlled, for the use of equipment furnished by them to respondents."

If the Commission is without jurisdiction in such circumstances and such tariff schedules are not required by the Act to be filed with the Commission, it would seem to follow that deviation therefrom could not be a violation of the Elkins Act in instances where such a private car company furnishes cars to the carrier. But whether the amount of the compensation to be paid under such circumstances is published in the tariffs or not, if the car company pays a portion of the compensation to a shipper, as in the *Reichmann* case, it violates the Elkins Act, since it thereby grants a rebate whereby the shipper obtains transportation at less than the published rate.

The Circuit Court of Appeals stressed the fact that the Elkins Act makes it a criminal offense to grant or accept rebates and provides for heavy fines and also imprisonment for violation of its provisions; and the opinion seems tacitly to expect

evidence in the record of this civil case that would prove guilt beyond a reasonable doubt, as in a criminal case. The court apparently failed to note that sections 2 and 3 of the Elkins Act provide for civil remedies in addition to the criminal procedure of section 1 and that the purpose of the Act as a whole was to aid in the enforcement of the *remedial* provisions of the Interstate Commerce Act. Cf. *United States* v. *Union Stockyard,* 226 U. S. 286, 306, 309.

The holding of the Circuit Court of Appeals, repeated several times in its opinion, that Congress by the enactment in 1906 of section 15 (13), Interstate Commerce Act, "provided for the right of owners shipping goods in interstate commerce to supply their carriers with the facilities necessary to the transportation of their products" is inaccurate and unsound. It was held by this Court in *A. T. & S. F. Ry. Co.* v. *United States,* 232 U. S. 199, 214–215, that:

> "Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and cannot be compelled to accept those tendered by the shipper on condition that a lower freight rate be charged. * * *."

As shown above, page 19, it is the duty of carriers to furnish transportation upon reasonable request, and transportation, within the meaning of the Interstate Commerce Act, includes cars. In

Use of Privately Owned Refrigerator Cars, supra, (201 I. C. C., page 373) the Commission said:

> "It is well-settled law that it is the duty of common carriers by railroad to furnish such cars as may be reasonably necessary for the transportation of all the commodities they hold themselves out to carry. That duty, imposed by statute, necessarily implies that the carriers have the exclusive right to furnish such equipment. It is optional with them whether they exercise that right by furnishing cars owned by them, cars owned by other carriers, or cars leased from independent contractors. * * *.
>
> A private-car owner, whether he be a shipper or not, has no right to have his cars used as a vehicle for the transportation of freight over the rails of any carrier without its consent. If the carriers have suitable cars and will furnish them on demand, they may refuse to transport shipments in private cars. They are privileged to do so at any time they have, or will secure and furnish, suitable equipment to carry the commodities they hold themselves out to transport. * * *."

In view of these authorities and upon reason, a shipper has no right to furnish any part of the transportation service which the carrier is under duty to perform. The only right given the shipper by section 15 (13) is to a reasonable allowance if, with the carrier's consent, he performs a part of the transportation service. Cf. *I. C. C.* v. *Waste*

Merchants Assn., 260 U. S. 32; *Waste Merchants Assn.* v. *Director General*, 57 I. C. C. 686.

It is true that, as pointed out in the Commission's report in *Use of Privately Owned Refrigerator Cars, supra*, the carriers undertake generally to furnish refrigerator cars, so that shippers desiring cars of that type have the alternative of either obtaining them directly from the carriers or arranging for their supply by a private car line, whereas, in the present case, involving a special type of tank car, the shipper could not rely upon the carriers for a dependable supply and was therefore under the necessity of either purchasing such cars for its use or otherwise obtaining them as by lease or rental from a car company. Yet this difference in circumstances does not affect the principle upon which the Commission's holding in the refrigerator car case rests. The fact that the shippers could get refrigerator cars from the carriers and instead chose in some instances to obtain them by lease under favorable terms from private-car concerns does not lessen the force of the fact that the terms were so favorable that the shippers were virtually certain of getting a profit and thereby reducing their aggregate freight bill by the amount of the profit, and obtaining transportation at that much less than the published tariff rates. That this is so is affirmed by the Commission's statement previously referred to that the general principles

enunciated in the refrigerator car case "apply equally to all other types of private cars."

Aside from the question whether shippers have the choice of obtaining cars from the carrier or from a private car line, the ultimate principle enunciated by the Commission's report, which we submit is sound, is that they may not lawfully make leasing arrangements with car lines so favorable in their terms that they can and do obtain transportation at less than the published tariff rates. Here it is the contention of the shipper that it is entitled to the full mileage allowances, irrespective of whether those allowances exceed its costs for the cars or not. The shipper made no effort to prove what its actual costs were. So far as the record shows or intimates, it had no costs other than the car rental. If it is sound, as a matter of law, that a shipper is not entitled to receive mileage allowances, in the case of leases, either directly from the railroad or indirectly through the car company, in excess of his rental and other expenses in connection with the cars, then the suit of this shipper must fail because it claims the entire mileage allowances without any proof as to what its actual costs were.

CONCLUSION.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed, upon the merits if this Court determines that the District Court had jurisdiction, or, if it determines

that the District Court was without jurisdiction, with directions to remand the case to the District Court for dismissal of the complaint on that ground.

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STATEMENT OF THE SOLICITOR GENERAL

The Solicitor General authorizes the submission of the foregoing brief, prepared by the Interstate Commerce Commission, as its presentation of its views upon the questions involved.

Robert H. Jackson,
Solicitor General.

November 1939.

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